STATE OF INDIANA

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FILED

MAR 0 3 2003

INDIANA UTILITY
REGULATORY COMMISSION

IN THE MATTER OF THE COMPLAINT OF INDIANA PAYPHONE ASSOCIATION FOR A COMMISSION DETERMINATION OF JUST AND REASONABLE RATES AND CHARGES AND COMPLIANCE WITH FEDERAL REGULATIONS

RESPONDENTS: AMERITECH INDIANA, VERIZON AND SPRINT/UNITED

CAUSE NO. 42303

You are hereby notified that on this date, the Indiana Utility Regulatory Commission has caused the following entry to be made:

On October 10, 2002, Complainant, Indiana Payphone Association, ("IPA" or "Complainant") filed its Complaint against Indiana Bell Telephone Company ("Ameritech"), Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (together "Verizon") and United Telephone Company of Indiana, Inc. d/b/a Sprint ("Sprint") (collectively the "Respondents") with the Commission. The Complainant sought a determination of whether Respondents' rates and charges for underlying pay telephone access lines, features and usage are reasonable, just, lawful, and comply with the Federal Communications Commission's (the "FCC") New Services Test as specified in the FCC's March 2, 2000 Order in FCC 02-25 as modified by its January 31, 2002 "Memorandum Opinion and Order."

On December 18, 2002, Respondents filed their "Joint Motion for Judgment on the Pleadings" (the "Joint Motion") requesting that the Commission deny the Complaint, in part, on the basis that IPA's Complaint requests that the Commission retroactively revise rates and order a refund violate the statutory and case law prohibition against retroactive ratemaking. The Complainant responded on December 23, 2002 and the Respondents filed their Reply on December 30, 2002.

Joint Motion for Judgment on the Pleadings.

In their Joint Motion, the Respondents requested that the Commission dismiss that portion of the Complaint that seeks a refund of the amount that Complainant alleged the Respondents overcharged for underlying pay telephone access lines, features and usage due to non-compliance with the FCC's New Services Test. Respondents argued that Complainant's request violates the statutory and case law prohibitions against retroactive ratemaking. Respondents alleged that "the

rates and charges challenged by the Petition [sic] have been and continue to be imposed pursuant to Commission-approved tariffs" to which no appeal was taken. Joint Motion at 1.

The Respondents argued that "any change in a standing rate order must operate prospectively only." Id. at 2. Respondents cite the Indiana Supreme Court in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*, 715 N.E.2d 351 (Ind. 1999) for the proposition that the Commission "cannot amend its orders or fix rates retroactively." Id. Respondents also quote the Indiana Court of Appeals as stating:

> We find nothing in the statute giving the Commission the power to cancel, or to fix, rates retroactively. That statute provides the Commission with the power to fix rates for the future if it finds the rates in effect to be unreasonable or unjust; but we look in vain to find statutory authority for the Commission to fix rates for the past...
>
> We are satisfied that no utility could attract capital for expansion or replacement of its property and facilities, or for any other purpose, if the Commission could at one time fix rates for that utility and then at some later time rescind those rates retroactively, fix lower rates retroactively and require the difference to be refunded to the ratepayers. The law of Indiana was not designed or intended to create chaotic conditions in the market where utilities, as well as other businesses go to obtain capital for their legitimate business purposes.

Indiana Bell Telephone Company v. Office of Utility Consumer Counselor, 717 N.E.2d 613, 625 (Ind. Ct. App. 1999), *modified on rehearing*, 725 N.E.2d 432 (Ind. Ct. App. 2000). Respondents further cite Ind. Code § 8-1-2-72 as requiring any change in a standing rate order to operate prospectively only.

Respondents objected to Complainant's characterization of the rates establish in Cause No. 40830 as "unlawful." They noted that regulated utilities must file rate schedules with the Commission and Ind. Code § 8-1-2-44 prohibits a utility from charging a rate other than those in their filed schedules. Id. at 2. Finally, Respondents argued that, under Ind. Code § 8-1-2-103, a utility cannot charge "greater or less compensation for any service ... than that prescribed in the published schedules or tariffs." Id. at 3.

IPA's Response to the Joint Motion.

In its "The Indiana Payphone Association's Response to Joint Motion for Judgment on Pleadings" (the "Response"), the IPA claimed that its requested refund is not barred by the general prohibition against retroactive ratemaking because the rates charged by the Respondents were unlawful. Response at 3. The Complainant cited *Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.*, 548 N.E.2d 153 (Ind. 1989) for the proposition that the rule against retroactive ratemaking applies only to lawful rates. According to IPA, "Indiana courts and this Commission have repeatedly recognized the Commission's authority to direct a refund to ratepayers of improperly gathered rates." Id.

The Complainant also cited the Court of Appeals in *Airco Industrial Gases v. Indiana Michigan Power Co.*, 614 N.E.2d 951 (Ind. Ct. App. 1993). According to the IPA, the Court of Appeals found that "the Commission would not violate the rule against retroactive ratemaking by ordering a refund" when "the rates paid under the tariff were unlawful." Id. at 4. Further, the Complainant noted that a docket entry issued by a former Commissioner and a former Administrative Law Judge in Cause No. 41100 addressed a similar motion to the one before the Presiding Officers here. In that docket entry, Hon. Priscilla J. Fossum and Comm. Camie J. Swanson-Hull stated:

> Because IPA's complaint states that 'the intrastate EUCL charges were, at least, indirectly, imposed on IPP providers based on and [sic] Order of the FCC which has now been declared erroneous,' the presiding officers find that the IPA may be entitled to relief. To the extent that the Commission determines that the EUCL charges were unlawfully collected, it has the authority under Indiana Code 8-1-2-69 to order a refund, and such refund would not constitute retroactive ratemaking. Thus, the rule of retroactive ratemaking does not bar relief.

Cause No. 41100, May 7, 2001 docket entry at 3. The Complainant also argued that Respondents' reliance on *Indiana Bell Telephone Company v. Office of Utility Consumer Counselor* was misplaced because the rate at issue in that case was not an illegal rate.

IPA, in its Response, argued that the Commission has the statutory authority to issue refunds. The Complainant claimed that Ind. Code § 8-1-2-69, "unquestionably confers authority on the Commission to direct a refund in cases such as this where the rate was illegal." Id. at 5.

Finally, the Complainant alleged that Respondents rates were unlawful because when Respondents' existing rates were established in Cause No. 40830, the Commission found no federal basis to require Respondents to submit cost support for their rates based on TSLRIC or TELRIC and held that payphone providers were not subject to unbundled network element ("UNE") pricing standards. According to the IPA, the Commission, in that same order, stated that uniform overhead loading was not mandated. The Complainant alleged that the rates and charges established by the Order in Cause No. 40830 do not comply with the New Services Test as clarified by the FCC's 2002 New Services Test Order. Response at 6. On that basis, the IPA rejected Respondents' claim that the tariffed rates were lawful and stated "the fact that a rate may be tariffed pursuant to Indiana Code 81-2-44 does not constitute a *per se* determination that those lawfully filed rates are just, reasonable, sufficient, or otherwise lawful for any purposes, when analyzed under any legal challenge." Id. at 7.

Respondents' Joint Reply.

In their, "Joint Reply to the Indiana Payphone Association's Response to Joint Motion for Judgment on the Pleadings" (the "Joint Reply"), the Respondents denied that the facts alleged in IPA's Complaint fall into an exception to the general prohibition against retroactive ratemaking and argued, in fact, that IPA's requested refund constitutes "classic retroactive ratemaking." Joint Reply

at 2.

Respondents asserted that a utility's filed rates are lawful rates and charges. Id. at 3. Respondents claimed that "[e]ven assuming *arguendo* that these rates are somehow 'unlawful' because of a 202 FCC decision, the Commission may only change them prospectively." Id.

Respondents further argued that the IPA's request was not supported by the cases Complainant cited. According to Respondents, in *Airco*, the Court of Appeals held that a refund was permitted, not because the Commission established an unreasonable or insufficient rate, but because the utility's tariff filing did not comply with the Commission's rate order. In *NIPSCO*, the refund was ordered under Ind. Code § 8-1-3-6 which allows refunds where rates are not sustained on appeal. Here, they argued, there was no appeal and no court decision vacating the Commission's original rate decision that would allow the Commission to order the refund requested. Respondents also claimed that Complainant's reliance on a docket entry in another cause before the Commissionhad no precedential value in this matter.

Respondents argued that the Complainant is wrong in its analysis of Ind. Code § 8-1-2-44. Respondents quote this Commission's Order in Cause No. 39474 as stating "Indiana Code § 8-1-2-44 conclusively establishes that tariffed rates are the lawful rates unless and until they are changed by the Commission." Reply at 11.

Standard of Review.

A Motion for Judgment on the Pleadings under Indiana Trial Rule 12(C) tests the legal sufficiency of the pleadings. *O'Connell v. Town of Schererville of Lake County,* 779 NE.2d 16 (Ind. Ct. App. 2002). For purposes of a motion for judgment on the pleadings, the Presiding Officers must view all of the well-pleaded facts alleged in the IPA's Complaint as true. *Rhoade v. Indiana Department of State Revenue,* 760 N.E.2d 621 (Ind. Ct. App. 2001). Moreover, all reasonable inferences must be drawn in favor of the Complainant. *Menefee v. Schurr,* 751 N.E.2d 757 (Ind. Ct. App. 2001). The moving party does not admit assertions which constitute conclusions of law, but for the purposes of the motion only, does concede the accuracy of the factual allegations in the Complainant's pleadings. *Eskew v. Cornett,* 744 N.E.2d 954 (Ind. Ct. App. 2001). Therefore the Presiding Officers must deny the Joint Motion if the relief sought by the IPA may be granted under any circumstance.

Analysis and Order.

Indiana Code § 8-1-2-69 grants the Commission broad authority to correct regulations, practices, acts and measurements that the Commission finds to be unjust, unreasonable, insufficient or preferential. Section 8-1-2-69 states, in relevant part, that

> The [C]ommission shall determine and declare and by order fix just and reasonable measurements, regulations, acts, practices, or service to be furnished, imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable,

unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory, inadequate, or otherwise in violation of this chapter as the case may be, and shall make such other order respecting such measurement, regulation, act, practice, or service as shall be just and reasonable.

Ind. Code § 8-1-2-69.

We find that broad authority granted in Section 8-1-2-69 includes the authority to order refunds if, as found by the Court of Appeals in *Airco,* the rate charged by the Respondents is determined to be an "unlawful" rate. As the Presiding Officers in Cause No. 41100 stated "[t]o the extent that the Commission determines that the EUCL charges were unlawfully collected, it has the authority under Indiana Code 8-1-2-69 to order a refund, and such refund would not constitute retroactive ratemaking."

While we make no determination here as to whether the facts as alleged by Complainant constitute an "unlawful" rate, we are constrained by the limits of Trial Rule 12(C) to view the facts as alleged in the Complaint as true and draw all reasonable inferences in favor of the Complainant. Therefore, we must view as true Complainant's allegation that the Respondents' rates and charges for payphone access lines, features and usage are "unlawful" for the purposes of Respondents' Motion to Dismiss.

The Presiding Officers hereby DENY Respondents' Joint Motion.

IT IS SO ORDERED.

David W. Hadley

David W. Hadley, Commissioner

Carol S. Comer

Carol S. Comer, Administrative Law Judge

Date: 3/3/03

Nancy E. Manley

Nancy E. Manley, Secretary to the Commission